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UNITED STATES OF AMERICA	)	
	)	
	)	<b>DEFENSE REQUEST FOR</b>
	)	<b>WITNESS</b>
v.	)	
	)	<b>(Professor Michael Schmitt)</b>
	)	
DAVID M. HICKS	)	20 October 2004
	)	

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The Defense in the case of the *United States v. David M. Hicks* requests the following witness for the 01 November 2004 motion hearing at Guantanamo Bay and in support of this request the defense states:

**1. Witness information:**

Professor Michael Schmitt  
Professor of International Law and Director, Program in Advanced Security Studies  
George C. Marshall European Center for Security Studies  
Garmisch-Partenkirchen, Germany

Office Phone: XXXX  
XXXX

**2. Need for translator:** None

**2. Synopsis of testimony:** It is anticipated the Mr. Schmitt will testify as an expert in the law of armed conflict (law of war), including but not limited to, the following:

a. Professor Schmitt will testify regarding the applicability of the Law of Armed Conflict (LOAC) to hostilities prior to the commencement, during, and following active U.S. and coalition military operations in Afghanistan. He will explain that an international armed conflict did not begin until October 7, 2001, because before that date there was no armed conflict between States; therefore, the law of armed conflict did not apply until that date. This testimony will demonstrate the erroneous nature of the time period contained in charge 1.

He will further testify that the international armed conflict between the United States and the former government of Afghanistan, the Taliban regime, likely ended in 2002 when the new interim government of Afghanistan, headed by Mr. Karzai, took power in Afghanistan. He will further testify that the only portion of the LOAC currently applicable to ongoing U.S. military operations in Afghanistan would be the provisions of Common Article 3 of the Geneva Conventions because the military operations taking place in Afghanistan against the remnants of the former Taliban regime constitute, at most, a non-international armed conflict. He will further testify that the ongoing military operations against al Qaida in Afghanistan do not trigger the LOAC because al Qaida is neither a state entity, nor a rebel group operating in the United States.

Professor Schmitt will also testify that the assertions by the prosecution that al Qaida is a “virtual state” are unsupported by any reasonable interpretation of international law and/or the LOAC.

He will further testify that the prosecutions assertions that the President's statements that the United States is at war with the al Qaida, or is engaged in an armed conflict with al Qaida, have no bearing on the application of the LOAC, and that prosecution assertions that such statements trigger the application of the LOAC as it applies to Mr. Hicks continued detention as an enemy combatant by the United States are incorrect.

Professor Schmitt will also testify regarding the requirements under the LOAC for an individual to be considered a lawful combatant. He will testify that under the LOAC, Mr. Hicks should have been granted an Article 5 tribunal soon after he was taken into custody by the United States. He will further testify regarding the implications of Mr. Hicks' attempts to comply with the LOAC as it pertains to lawful combatants.

Professor Schmitt will also testify regarding the implications of Mr. Hicks' alleged status as an unprivileged belligerent, and the implications of that status. Specifically, he will testify that the offense of "murder by an unprivileged belligerent" is not a war crime as contained in charge 2 and one of the objects of Charge 1. He will testify Mr. Hicks' that the mere status of unprivileged belligerent is not an offense under the LOAC, and that if, in fact, he aided in a murder, attempted to murder, or in fact participated in the murder of American personnel and/or coalition partner personnel, Mr. Hicks could only be tried under the domestic law of a state with domestic jurisdiction over Mr. Hicks.

The above testimony is relevant to the defense motions to dismiss or for appropriate relief for imposition of improper pretrial detention; the international armed conflict in Afghanistan has ended; for failure to state an offense of "murder by an unprivileged belligerent;" for failure to state an offense of "destruction of property by an unprivileged belligerent; and other defense motions.

It should be noted the defense may ask Professor Schmitt to testify regarding other concepts relevant to the LOAC that are implicated by Mr. Hicks' case. This synopsis is not intended to convey every possible point, opinion, or relevant fact that Professor Schmitt has to offer as part of his testimony. Please refer to the arguments in the defense motions. The motion documents contain additional cites to relevant legal concepts about which Professor Schmitt may testify.

3. **Source of knowledge:** I have spoken to him previously.

4. **Use of testimony:** This witness will testify on for the motion hearing scheduled to begin 1 November 2004.

5. **Reasonable availability of witness:** Mr. Schmitt is available to testify by telephone.

6. **Alternative to live testimony:** The defense believes that a stipulation of expected testimony is not a viable option for this witness. Much of the expected testimony is intended to educate the commission on relevant areas of law, some of which will include opinion. Further, a stipulation of expected testimony would take away the commission's opportunity to question this witness regarding complex issues of the LOAC and its implications for Mr. Hicks case. Moreover, some of the facts and opinions the witness will testify about are in direct contravention of opinions the prosecution has cited in its responses to defense motions. Alternatives to testimony such as written opinions, briefs, telephonic testimony, or affidavits will not be sufficient to adequately convey to the commission the complex concepts of LOAC and its application to Mr. Hicks' continued detention, trial by military commission for certain offenses, the implications of the existence of an armed conflict with al Qaida and/or the Taliban regime and/or its remnants. Moreover, using such alternatives to testimony would deprive the

commission of the important opportunity to question Professor Schmitt regarding the topics on which he would testify, and others topics in to which the commission desired to inquire.

7. **Is the witnesses cumulative with other witnesses:** No.

8. **Attachments:** CV of Mr. Schmitt

By: \_\_\_\_\_  
M.D. MORI  
Major, U.S. Marine Corps



**DEPARTMENT OF DEFENSE  
OFFICE OF THE CHIEF DEFENSE COUNSEL  
OFFICE OF MILITARY COMMISSIONS**

13 September 04

**MEMORANDUM FOR THE CHIEF DEFENSE COUNSEL**

**SUBJECT: Request for expanding the scope of assistance of law of war consultant**

1. I am requesting our defense team's consultant in international humanitarian law/law of war consultant, Michael Schmitt, be allowed to assist the defense team at Guantanamo Bay during motions hearing.
2. At present, the current approval of Mr. Schmitt's assistance is on an ad hoc basis as reflected in enclosure 1. It is imperative that the defense have the ability to utilize our consultant in preparation and during any cross-examination of government expert witnesses which can only be effectively done with Mr Schmitt in attendance of the motion hearing.
3. The first motion hearing is tentatively set for 2 November 2004.

A handwritten signature in black ink, appearing to read "MD MORI".

**MD MORI**  
Major, U.S. Marine Corps  
Detailed Defense Counsel

# Professor Michael N. Schmitt

## Current Position

Director, Leaders of the 21<sup>st</sup> Century Program and Professor of International Law, College of International Security Studies, [George C. Marshall European Center for Security Studies](#), Garmisch-Partenkirchen, Germany

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## Education

### *Academic*

LL.M, Yale Law School  
JD, University of Texas  
MA (National Security and Strategic Studies), Naval War College  
MA (Political Science/History), Southwest Texas State University  
BA (Political Science/History), Southwest Texas State University

### *Professional*

Naval War College  
Air War College  
Air Command and Staff College  
Marine Command and Staff College  
Air Force Squadron Officers School

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## Professional Affiliations

Member, [Institute of International Humanitarian Law](#)  
Member, [International Law Association](#) (British Branch)  
[NATO School](#), Adjunct Faculty  
[American Society of International Law \(ASIL\)](#)  
[Société Internationale de Droit Militaire et Droit de la Guerre](#), UK Branch  
Editorial Board, [International Law Studies Series](#)  
Executive Committee, [Lieber Society](#), [ASIL](#)

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## Professional Experience

2003-Present: Director, Leaders of the 21st Century Program and Professor of International Law, George C. Marshall European Center for Security Studies.  
1999-2003: Director, Executive Program in International and Security Studies, George C. Marshall European Center for Security Studies  
1998-1999: Professor and Deputy Head, Department Of Law, United States Air Force Academy  
1997-1998: Visiting Scholar, Yale Law School

1996-1998: Professor of International Law, Naval War College  
1997: Staff Judge Advocate, Operation Northern Watch (No-Fly Zone Over Iraq)  
1995-1996: Student, United States Naval War College  
1993-1995: Staff Judge Advocate, Incirlik Air Base, Turkey  
1991-1993: Staff Judge Advocate, Iraklion Air Station, Greece  
1990-1991: Student, Yale Law School  
1988-1990: Assistant Professor of Law, United States Air Force Academy  
1987-88: Defense Counsel, Florennes Air Base, Belgium  
1986-87: Deputy Staff Judge Advocate, Florennes Air Base, Belgium  
1984-1986: Assistant Staff Judge Advocate, Incirlik Air Base, Turkey  
1981-1984: Student, University Of Texas Law School  
1979-1981: Chief, Operational and Targeting Intelligence, Incirlik Air Base, Turkey

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## Awards

### *Scholarship*

Annual Waldemar Solf Lecture, U.S. Army Judge Advocate General's School, 2003  
Elected Member, International Institute of Humanitarian Law, 2002  
Klaus Kuhn Prize, International Institute of Humanitarian Law, 2000  
Hugh Nott Prize, Naval War College, 1999  
Military Operations and Law Prize, Naval War College, 1996  
Society for Strategic Air Command Award, Best Air Force Law Review Article, 1994  
Ambrose Gherini Prize for International Law, Yale Law School

### *Professional*

American Bar Association, Special Commendation for Exemplary  
Commitment to Public Service, 39th Wing Law Center, 1995  
American Bar Association, Outstanding Air Force Lawyer Award, 1991-92  
Outstanding Judge Advocate, U.S. Air Forces, Europe, 1991  
New York Bar Association Award for Trial Advocacy, USAF Judge Advocate General's  
School, 1987  
Outstanding Judge Advocate, U.S. Air Forces, Southern Europe, 1985  
Joint Meritorious Service Medal  
Meritorious Service Medal (eight)  
Air Force Achievement Medal (Specific Accomplishment)  
Humanitarian Service Medal  
Southwest Asia Service Medal (with Battle Star)  
Armed Forces Expeditionary Medal

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Germany  
Phone XXXX Fax XXXX

Michael Schmitt  
George C. Marshall European Center for Security Studies  
CMR XXXX, Box XXXX  
APO AE XXXX

E-mail: [XXXX](#)



DEPARTMENT OF DEFENSE  
OFFICE OF THE CHIEF PROSECUTOR  
1610 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1610

October 22, 2004

MEMORANDUM FOR DETAILED DEFENSE COUNSEL ICO DAVID MATTHEW HICKS

SUBJECT: Witness Request for Professor Michael Schmitt

1. On October 20, 2004, the Defense Counsel in U.S. v. Hicks requested the above-named witness be produced for live testimony at Guantanamo Bay, Cuba. For the reasons laid in our Motion to Exclude Attorney and Legal Commentator Opinion Testimony of October 13, 2004 and Reply thereto of October 22, 2004, we object to this form of testimony. Accordingly, your request is denied.

Lieutenant Colonel, U.S. Marine Corps  
Prosecutor  
Office of Military Commissions

Attachment:  
As stated



**From:** XXXX. CIV (L)

**Sent:** Thursday, October 28, 2004 4:54 PM

**To:** XXXX CIV (L); 'Mori, Michael, MAJ, DoD OGC'; 'Swann, Robert, COL, DoD OGC'; XXXX, LtCol, DoD OGC'; 'Will Col DoD OGC Gunn (Gunn, Will, Col, DoD OGC)'; XXXX; XXXX; XXXX, COL, DoD OGC'; XXXX, MSG, DoD OGC (XXXX)'; 'Lippert, Jeffery MAJ Bamberg Law Center'; XXXX, MAJ, DoD OGC (XXXX)'; Brownback, Peter E. COL (L)

**Subject:** United States v. Hicks, Decision of the Presiding Officer, D30

United States v. Hicks

Decision of the Presiding Officer, D30

The Presiding Officer has denied the request for production of Mr. Schmidt as a witness. The Presiding Officer did not find that he is necessary. See Military Commission Order 1, section 5H. Accordingly, this request has been moved from the active to the inactive section of the filings inventory in accordance with POM 12. See also paragraph 8, POM 12.

By Direction of the Presiding Officer

XXXX

Assistant to the Presiding Officers

XXXX

Voice: XXXX

Fax: XXXX



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UNITED STATES OF AMERICA	)	
	)	
	)	<b>DEFENSE MOTION -</b>
	)	<b>THE ENTIRE COMMISSION</b>
v.	)	<b>TO GRANT PRODUCTION OF</b>
	)	<b>WITNESS DENIED IN D 30</b>
	)	
DAVID HICKS	)	<b>(Michael Schmitt)</b>
	)	
	)	29 October 2004

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The Defense previously requested that name of witness be produced. The request was denied by the Presiding Officer under the provisions of Military Commission Order 1, section 5H.

The Defense requests the Commission direct the production of the witness, and that the Commission consider the following previously made filings, and the attachments thereto, per the Filings Inventory D30, in making its determination.

- a. Motion by the defense requesting Mr. Schmitt.
- b. Decision of the Presiding Officer denying the witness.
- c. The government response to D30, if any.

By: \_\_\_\_\_  
M.D. MORI  
Major, U.S. Marine Corps